

P-3140/NA-93-781 ORDER APPROVING PETITION WITH REQUIREMENTS AND  
REQUIRING FURTHER FILINGS

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair  
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In the Matter of an Application by FIBRCOM  
Incorporated for Authority to Provide Private  
Line and Special Access Services in Minnesota

ISSUE DATE: April 22, 1994

DOCKET NO. P-3140/NA-93-781

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**PROCEDURAL HISTORY**

On August 12, 1993, FIBRCOM Incorporated (FIBRCOM), a wholly-owned subsidiary of KBLCOM, Inc., filed a petition seeking approval to build and operate a dedicated, non-switched digital fiber optic network in the Minneapolis/St. Paul metropolitan area.

The Department of Public Service filed reports and comments generally favoring the application on November 10, 1993, and December 30, 1993.

On December 10, 1993, the Commission issued a notice soliciting public comment on both the FIBRCOM petition and a similar petition filed by Continental Telecommunications Corporation of Minnesota (Continental), Docket No. P-3123/NA-93-198.<sup>1</sup>

In addition to the Department, the following parties filed comments: US WEST Communications, Inc. (US WEST); Minnesota Business Utilities Users Council (MBUUC); Residential Utilities Division of the Office of the Attorney General (RUD-OAG); AT&T; Metropolitan Fiber Systems of Minneapolis/St. Paul, Inc. (MFS); and MCI Telecommunications (MCI).

The matter came before the Commission for consideration on March 23, 1994.

**FINDINGS AND CONCLUSIONS**

**I. Introduction**

In this Order the Commission will first describe the petition filed by FIBRCOM. The Commission will discuss the procedure for reviewing the petition, then decide if the petition should be granted and under what conditions. Finally, the Order will address other related issues raised by US WEST.

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<sup>1</sup> Because the FIBRCOM and Continental petitions were similar and the issues raised were common to both, the Commission considered the applications in joint proceedings. Most comments submitted were addressed to both petitions. The Commission granted the Continental petition by separate Order on this same date.

## **II. The Petition**

FIBRCOM proposed constructing and operating a dedicated, non-switched digital fiber optic network in the Minneapolis/St. Paul metropolitan area. Until FIBRCOM constructed its own fiber optic network, it would offer its services through facilities leased from other carriers. FIBRCOM would provide its services through three types of offerings: (1) end-user to end-user; (2) end-user to the point of presence (POP) of an interexchange carrier (IXC); and (3) POP to POP.

In its petition FIBRCOM stated that it would offer individually case-based (ICB) pricing for its proposed services. The ICB prices would apply to both recurring and nonrecurring charges. FIBRCOM would execute individual contracts with each of its customers.

## **III. Analysis of FIBRCOM's Petition**

### **A. Analysis Under Minn. Stat. § 237.16**

Although Continental sought a certificate of public convenience and necessity in a separate docket, Continental's and FIBRCOM's petitions were considered jointly. Arguments raised in both dockets were addressed by parties to both proceedings.

In its filings Continental noted that private line services have been declared emergingly competitive in Minn. Stat. § 237.59, subd 1 (12). Continental argued that this fact alters the traditional analysis of public convenience and necessity under Minn. Stat. § 237.16. According to Continental, the presence of market competition creates a presumption of public convenience and necessity which will prevail in the absence of a finding of harm to ratepayers.

Although the Department stated that the traditional public convenience and necessity analysis must be followed, the Department also seemed to acknowledge a presumption of public convenience and necessity arising from the competitive classification of private line service. The Department and FIBRCOM noted the Commission's approval of private line certification for Metropolitan Fiber Systems in the June 16, 1989 ORDER GRANTING CERTIFICATE OF AUTHORITY in Docket No. P-495/EM-89-80. The Department stated that in both the Metro Fiber case and the present case the proposed services would provide redundancy for data transmission and a de minimis impact on the incumbent providers.

The RUD-OAG stated that neither the competitive nature of private line services nor the Commission's decision in Metro Fiber should replace traditional public convenience and necessity analysis under Minn. Stat. 237.16. The RUD-OAG suggested a number of factors which could be applied to that analysis.

The Commission finds that the FIBRCOM petition must be analyzed under the factors of the governing statute, Minn. Stat. § 237.16. While the competitive status of private line service and the Commission's precedent in the Metro Fiber case will be considered in the decision process, they do not shift the burden of proof nor modify the basic analysis.

When determining the requirements of public convenience and necessity the Commission acts in a quasi-legislative capacity, weighing public benefit against public harm and giving consideration to all appropriate factors. Arvig Telephone Co. v. Northwestern Bell Telephone Co., 270 N.W.2d 111, 114-15 (Minn. 1978). In such a process the Commission will be allowed to apply its sound discretion.

Determination of convenience and necessity, like determination of rates, is a legislative matter.

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The term "convenience and necessity" is an elastic one for which no definite rule can be stated that will apply to all cases. Each case must stand on its own facts, and the commission must be given some latitude in applying the yardstick.

Dahlen Transport, Inc. v. Hahne, 261 Minn. 218, 225, 112 N.W.2d 630, 635 (1961)

The Commission will therefore turn to an analysis of the public convenience and necessity under Minn. Stat. § 237.16, weighing the relative public burdens and public benefits which will flow from this petition. Ultimately, the Commission must determine if granting the petition will serve the public interest.

## **B. The Public Interest**

### **1. Positions of the Parties**

The petitioner, the Department, the RUD-OAG, AT&T, MBUUC, and MCI all recommended that the Commission find the FIBRCOM application in the public interest. The incumbent providers, US WEST and MFS, did not object to the Commission's granting the application.

The parties cited numerous benefits of the proposed services: redundancy and diversity of routing for business customers; lower rates which would better reflect the cost of service; greater consumer choice of services; improved efficiency; stimulation of technological development; and incentives for the introduction of new services by new providers.

Although US WEST did not oppose the petition, it stated that it would experience revenue erosion as a result of the increased competition. US WEST also cited several concerns (see discussion at Section V below) which it felt the Commission must address if the petition were granted.

The Department predicted that approval of the application would have a de minimis impact on US WEST's revenues. The Department did not cite specific burdens which would be imposed by granting the petition. The Department did advocate, however, that the Commission impose certain restrictions and requirements on the applicant to ensure that the provision of service remained in the public interest. (See Subsection IV (B) (3) following.) The RUD-OAG

concurrent in the Department's recommendations.

No other parties cited burdens associated with the petition.

## **2. Commission Analysis**

The Commission agrees with the RUD-OAG that in this particular set of facts a line of considerations used previously by the Commission in other public convenience and necessity determinations may prove useful:

1. The public need for the proposed service;
2. The ability of an applicant to provide the proposed service;
3. The level of desirable competition;
4. The ability of the existing providers to satisfy the demonstrated public need;
5. The impact of granting additional market entry on existing providers;
6. The impact upon ratepayers generally of authorizing a duplicate service provider; and
7. The degree to which additional market entry will advance public policy objectives.

See, for example, In the Matter of the Independent Equal Access Corporation's Application for a Certificate of Public Convenience and Necessity, Docket No. P-3007/NA-89-76, ORDER GRANTING CERTIFICATE OF AUTHORITY TO PROVIDE EQUAL ACCESS SERVICES (January 10, 1991). Also, Arvig Telephone Co. v. Northwestern Bell Telephone Co., 270 N.W.2d 111, 114-15 (Minn. 1978).

In this case, customer interest in the proposed products has demonstrated public need for the services. FIBRCOM has stated that it has the technological ability to provide the proposed services. The level of competition will remain within the bounds that the Commission deems acceptable. Four providers in the Twin Cities area (US WEST, MFS, FIBRCOM, and Continental, which was also granted a certificate by separate Order) should provide choice and convenience for consumers without reaching a detrimental level of competition. Although facilities may be duplicative, the parties agree that in this type of offering redundancy can bring greater reliability.

Although US WEST, an existing provider, has stated that the new competition will have an adverse impact on its revenues, US WEST has offered no proof for this supposition. Nothing in the record shows that US WEST ratepayers will be harmed by the entry of two new providers, FIBRCOM and Continental, into the market. The Commission also notes that neither US WEST nor the other incumbent, MFS, is opposed to the Commission's granting of the applications. In fact, both US WEST and MFS recommended that the Commission approve the application.

The Commission agrees with the Department and the RUD-OAG that analysis of a competitive service will place less importance on the incumbent's ability to provide the service. As long as the Commission finds that the level of competition remains acceptable, further entrants will provide consumers the benefits of efficiency, choice and enhanced technology.

After weighing the possible burdens against possible benefits of the proposed services, and analyzing the aforementioned public convenience and necessity factors, the Commission finds that certification for FIBRCOM is in the public interest. The Commission finds that certain restrictions and further requirements (discussion following) will help ensure that FIBRCOM's

offerings remain in the public interest.

### **3. Restrictions and Further Requirements for the Applications**

#### **a. Geographical Limitations**

FIBRCOM sought permission to offer its services in the Minneapolis/St. Paul metropolitan area. Although the applicant attached a map purporting to show this territory, the area shown on the map did not correspond precisely with the seven-county metropolitan area.

Only the Department addressed the area to be covered by the new certificate. The Department recommended that the proposed services be restricted to the Minneapolis/St. Paul metropolitan area.

The Commission finds that FIBRCOM's certificate should be restricted to the seven-county Minneapolis/St. Paul metropolitan area. This restriction will provide more precise boundaries than the map included by the applicant. It will provide FIBRCOM the opportunity to serve the entire Twin Cities metro area, including its major suburbs, without further certification procedures.

#### **b. Tariff Filings**

FIBRCOM proposed the use of ICB pricing for its services. FIBRCOM explained that incremental costs of providing certain services could vary among customers, depending upon factors such as types of services and packages of features offered.

Minn. Stat. §§ 237.07 and 237.071 allow the use of ICB pricing in some cases when statutory filing requirements are met.

Minn. Stat. § 237.09 prohibits discriminatory pricing under any pricing scheme:

No telephone company, or any agent or officer thereof, shall, directly or indirectly, in any manner, knowingly or willfully, charge, demand, collect, or receive from any person, firm, or corporation, a greater or less compensation for any intrastate service rendered or to be rendered by it than it charges, demands, collects, or receives from any other firm, person, or corporation for a like and contemporaneous intrastate service under similar circumstances.

The filing of ICB contracts will only be a check against price discrimination if similarly situated customers are treated similarly, **and** if a comprehensible definition of similar situations is available for customers and for regulatory overseers. At this time, when no contracts under the proposal have yet been signed, it is unclear if FIBRCOM will be seeking trade secret treatment for the ICB contracts. The Commission will therefore initiate its own investigation into proprietary treatment requested for the contracts (if any) when they are eventually signed and filed. The investigation will include ICB contracts filed for special access and private line offerings by FIBRCOM, Continental, US WEST and MFS. When this information has become available to the Commission, the Commission will determine if further action should be taken regarding any requests for trade secret status.

At this time, the Commission will monitor FIBRCOM's pricing practices by setting the following filing requirements:

1. FIBRCOM shall file updated copies of its private line and special access tariffs with the Commission and the Department. The tariffs shall include provisions requiring the same contract terms and rates for similarly situated customers.

2. FIBRCOM shall file with the Department copies of its contracts with individual customers, including enough detail to enable the Department to verify the estimation of incremental cost and if rates do/do not exceed costs by a reasonable margin.

**c. Affiliate Transactions**

FIBRCOM was opposed to any limitation of its ability to seek the best means of providing service, whether through contracts with affiliated companies or through contracts with nonaffiliates.

The Commission agrees that FIBRCOM should be free to bargain for and enter into the most favorable contracts for provision of its services, provided that such negotiations are at arms-length and the contracts are free of any cross-subsidization. In order to ensure that the offering of these services will not result in cross-subsidization, the Commission will establish the following requirements:

1. FIBRCOM shall be prohibited from any and all forms of cross-subsidization;

2. All contracts and related documents between FIBRCOM and any of its affiliates or related companies shall be submitted to the Department for review either before such contracts are entered into or, in the alternative, no later than five working days after the contracts are entered into. The Department shall review all such contracts and related documents and if any improper dealing between the telephone company and its affiliate or related company exists the Department shall bring it to the attention of the Commission;
3. FIBRCOM shall serve all customers who request its services except where, due to technical limitation, it is not able to do so;
4. All relevant sections of the statutes, Commission rules and prior Orders shall be applicable to FIBRCOM.

## **V. Issues Raised by US WEST**

US WEST stated that it did not oppose the FIBRCOM application because it believed that it represents an inevitable increase of competition in the telecommunications industry.

US WEST argued that the Commission should take the opportunity to examine some of the consequences of rising competition. US WEST urged the Commission to state policy guidelines for the classification of special access services, the deaveraging of rates for private line and special access services, and universal service obligations for private line and special access providers.

### **A. Classification of Special Access as Emergingly Competitive**

#### **1. US WEST's Position**

Private line is a leased telephone line permitting unlimited voice and data transmission between two points at a set rate. Private lines are not connected to the local exchange public switched network. Access for private lines to the local exchange network is provided under special access tariffs.

Private line services are currently classified as subject to emerging competition under Minn. Stat. § 237.59, subd. 1 (12). Special access services are not classified under Minn. Stat. § 237.59, and have not been deemed emergingly competitive by the Commission. Since they have not been classified as emergingly competitive, they are considered noncompetitive.

US WEST asked the Commission to use this opportunity to classify special access services as emergingly competitive. US WEST argued that private line and special access are not significantly different. The company explained that it often packages service offerings using the two services as part of one offering. US WEST stated that it is often hampered in its response to competitors by the need to follow two levels of regulatory process for the two services. Classifying special access as emergingly competitive would eliminate duplicity of regulations and allow flexibility and responsiveness in an increasingly competitive market.



## **2. Commission Analysis**

In other proceedings, the Commission has addressed the competitive classification of a service in generic proceedings.<sup>2</sup> In this case, although US WEST asked the Commission to consider a classification issue while addressing the certification petitions, no party has formally requested that the Commission reclassify special access services. A record has not been developed regarding that issue and parties have not formally addressed it. For these reasons the Commission will not at this time consider reclassifying special access services as emergingly competitive. Any party is free to formally petition the Commission to open a proceeding in which reclassification of special access services would be addressed.

### **B. Deaveraged Rates**

#### **1. US WEST's Position**

US WEST stated that the increasing competition for special access and private line services will eventually make averaged rates impractical. As more providers enter the market and the market expands to the entire state, the competition will require providers to offer flexible pricing. US WEST urged the Commission to make a policy statement that deaveraged rates will be the logical consequence of increased competition.

#### **2. Commission Analysis**

The Minnesota legislature has set a policy which requires telephone companies to offer the same service at the same price in all geographic locations, unless for good cause shown. Minn. Stat. § 237.60, subd. 3 provides in relevant part:

No telephone company shall offer telecommunications service within the state upon terms or rates that are unreasonably discriminatory. No telephone company shall unreasonably limit its service offerings to particular geographic areas unless facilities necessary for the service are not available and cannot be made available at reasonable costs. The rates of a telephone company must be the same in all geographic locations of the state unless for good cause the commission approves different rates.

In this case, US WEST has asked the Commission to state that rate deaveraging will follow the increasing competition for special access and private line services in Minnesota. The Company has not requested deaveraging of specific rates, nor has it offered a record to establish good cause for any deaveraging.

The Commission finds that Minn. Stat. § 237.60, subd. 3 provides for case by case determinations of rate fairness, not for a Commission policy statement regarding the future consequences of competition. US WEST has not attempted to offer evidence of good cause for rate deaveraging at this time. If the Company wishes to offer such evidence, it may petition the Commission at another time.

The Commission also notes that special access and private line providers, including US WEST, have the ability under existing statutes to offer ICB pricing for their services. This ability should provide flexibility for providers to tailor their offerings to respond to competition.

The Commission will not grant US WEST's request to make a statement that rate deaveraging

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<sup>2</sup> See, for example, In the Matter of the Applications for Authority to Provide Alternative Operator Services in Minnesota, Docket No. P-999/CI-88-917, ORDER AFTER RECONSIDERATION (March 25, 1991).

will follow increased competition for special access and private line offerings.

### **C. Universal Service Obligations for Private Line and Special Access Providers**

#### **1. US WEST's Position**

US WEST stated that increasing competition for special access and private line services could seriously erode its revenues and consequently decrease its level of contribution to universal service. US WEST urged the Commission to find that all providers of telephone service, including special access and private line providers, must contribute to universal service.

The Department responded that any carriers who provide local exchange services should be responsible for universal service assessments. The Department recommended that the Commission open a docket to evaluate the obligations of competitive access and private line providers to support programs such as TAP, TACIP and 911/E911.

#### **2. Commission Analysis**

The Commission agrees with US WEST that an increasingly competitive telecommunications environment may require a reassessment of universal service obligations. A reassessment may be necessary for all telephone services, not just private line or special access, and for all facets of universal service, not just TAP, TACIP, 911 and E911.

At this time, however, the Commission does not have the necessary information to examine the implications of competition for universal service. The Commission will therefore require the Department to file in this docket a report and recommendations regarding the universal service issue. When the Commission has had the opportunity to examine the Department's report, the Commission will determine what, if any, further action must be taken regarding this issue.

### **ORDER**

1. FIBRCOM Incorporated is hereby granted a certificate of authority to provide dedicated, non-switched local and interexchange private line and special access services in the Minneapolis/St. Paul metropolitan areas of Anoka, Carver, Dakota, Ramsey, Hennepin, Scott, and Washington counties.
2. FIBRCOM shall file updated copies of its private line and special access tariffs with the Commission and the Department. The tariffs shall include provisions requiring the same contract terms and rates for similarly situated customers.
3. FIBRCOM shall file with the Department copies of its contracts with individual customers, including enough detail to enable the Department to verify the estimation of incremental cost and if rates do/do not exceed costs by a reasonable margin.
4. FIBRCOM is prohibited from any and all forms of cross-subsidization.
5. All contracts and related documents between FIBRCOM and any of its affiliates or related companies shall be submitted to the Department for review either before such contracts are entered into or, in the alternative, no later than five working days after the contracts are entered into. The Department shall review all such contracts and related documents and if any improper dealing between the telephone company and its affiliate or related company exists the Department shall bring it to the attention of the Commission.

6. FIBRCOM shall serve all customers who request its services except where, due to technical limitation, it is not able to do so.
7. All relevant sections of the statutes, Commission rules and prior Orders shall be applicable to FIBRCOM.
8. Within 90 days of the date of this Order, the Department shall file a report regarding the implications of competition for universal service obligations.
9. The Commission denies US WEST's request to reclassify special access services in this proceeding.
10. The Commission denies US WEST's request to make a statement regarding the effects of increased competition on rate averaging.
11. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)